

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:   
SOKOLOW, et al, : 04-CV-397 (GBD)  
:   
Plaintiffs, : October 21, 2014  
:   
v. : 500 Pearl Street  
: New York, New York  
PALESTINE LIBERATION ORGANIZATION, et al, :  
:   
Defendants. :  
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TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY DISPUTES  
BEFORE THE HONORABLE RONALD L. ELLIS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: Good afternoon. This is Judge Ellis.  
2 Can I have your appearances beginning with the plaintiff?

3 MR. HORTON: Yes, Your Honor. Good morning. This  
4 is Phil Horton of Arnold & Porter and I also have with me on  
5 the phone Kent Yalowitz. Mr. Yalowitz is out of town and  
6 dialing in by cell phone. His connection may be a bit spotty  
7 but he's on.

8 THE COURT: Thank you.

9 MR. HILL: Good morning, Your Honor. It's Brian  
10 Hill and Laura Ferguson for the defendants.

11 THE COURT: This is a conference in Sokolow, et al.  
12 v. PLO, et al., 04-CV-397. It is Tuesday, October 21<sup>st</sup> at  
13 approximately twelve noon.

14 This is a conference involving discovery matters  
15 although discovery has officially closed. To the extent that  
16 any issues arise as the parties prepare for trial that relate  
17 to matters that began in discovery Judge Daniels has indicated  
18 that those should be resolved by me.

19 Two issues have been brought up by the parties, at  
20 least that I'm aware of. One is defendant's motion for a  
21 preclusion sanction based upon the plaintiff's filing on ECF  
22 material that quoted matters that had been designated  
23 confidential during discovery and the second issue concerns  
24 plaintiff's motion to compel supplementary discovery material  
25 pertaining to documents that record payments to families of

1 suicide terrorists.

2           So with regard to those issues, I have the -- I  
3 believe I have all of the parties submissions although I  
4 believe someone sent in something that we received today.

5           MR. HILL: Your Honor, this is Brian Hill on behalf  
6 of the defendants. I sent a FedEx on Friday that I understand  
7 was delivered on Monday. I hope you had received that.  
8 That's the latest submission.

9           MR. HORTON: Your Honor, this is Phil Horton for the  
10 plaintiffs. We had received -- I assume this is the same  
11 submission that Mr. Hill just mentioned -- around the close of  
12 business on Friday. We submitted a response to that I think  
13 early afternoon yesterday. So you should have that but you  
14 may have gotten our response before you got his letter  
15 depending on what time they came into your chambers.

16           THE COURT: Okay. I have -- is your response dated  
17 October 20<sup>th</sup>?

18           MR. HORTON: Yes, sir.

19           THE COURT: All right. I have those and I -- to  
20 begin with let's start with the first issue, that is  
21 concerning the preclusion sanctions. I begin by reminding the  
22 parties that I have discussed the standards that I believe is  
23 necessary for preclusion in the prior motion in which the  
24 plaintiffs had made a request for preclusion and under those  
25 circumstances I do want to make clear that I find it be an

1 extraordinary sanction that should only be used in situations  
2 where it is beyond cavil that the party is being non  
3 responsive so much so that the only possible way to deal with  
4 them is to make an order of preclusion.

5           As I said in that opinion in a typical situation the  
6 default is that matters be decided on the merits. Fortunately  
7 for this particular issue I have some familiarity with the  
8 history of the parties and their disagreements about what --  
9 what happened, what should have been designated confidential  
10 and what transgressions the plaintiffs have made over the  
11 course of my supervision. I know the defendants say that this  
12 is the fourth time that there's been a violation of the  
13 confidentiality agreement that the parties have.

14           And as to the facts of this case it is -- I take it  
15 though that in their vigilance the defendants noted the  
16 transgression such that it was publicly available for  
17 approximately one hour. Is that true or is there some dispute  
18 about that?

19           MR. HILL: I don't think there's any dispute about  
20 how long it was available, Your Honor.

21           THE COURT: Okay. Essentially the plaintiff's  
22 position is that it was inadvertent.

23           MR. HORTON: That's correct, Your Honor.

24           MR. YALOWITZ: Correct, Your Honor.

25           THE COURT: In that regard, again, taking -- keeping

1 in mind that as I said preclusion is like the final resort to  
2 courts when there's been a series of behaviors in defiance of  
3 the court I -- it seems to me that what this really turns on  
4 is whether or not the circumstances suggest that the violation  
5 by the plaintiffs was willful and in bad faith and deliberate  
6 and I guess the -- my disconnect here is given the way this  
7 case has progressed I'm not sure how -- what the thinking is  
8 as to what -- why the plaintiffs would have deliberately done  
9 this and what could they have -- how could they have  
10 benefitted from it.

11 MR. HILL: Your Honor, this is Brian Hill. I can  
12 make speculation if that's what Your Honor is inviting us. I  
13 don't know -- I can't imagine frankly why plaintiff's counsel  
14 did this. It's apparent from the document itself that it's  
15 not labeled as filed under seal which is what the order  
16 requires. So it appears to me that there was a decision to  
17 file it in the open and that they did so. I can speculate  
18 that they hoped it would be publicly disclosed. They've  
19 argued in the past that this material should be publicly  
20 disclosed. There are cases proceeding against our clients in  
21 other nations, particularly Israel that these lawyers are  
22 hooked in with. Maybe they were hoping the material could be  
23 useful there.

24 I'm really in the posture of having litigated this  
25 with Your Honor now for three years I guess. The original

1 idea was that we could produce material with the assurance  
2 that it would be held confidential and not publicly disclosed  
3 and we wouldn't have to fight about its relevance and under  
4 those terms the plaintiffs were allowed to get the material  
5 and potentially use it in this case and that benefit of the  
6 bargain I've effectively lost.

7           The plaintiffs have filed by their own admission the  
8 content of 177 documents. We have no idea who may have  
9 downloaded them during that one-hour period. We know that  
10 people within the public are following the case. For example,  
11 there's an article in the *New York Law Journal* this morning  
12 about Your Honor's prior order on sanctions and these included  
13 among other things intelligent files of our client which under  
14 our client's law are state secrets and confidential and the  
15 content of them was posted on the web for anyone with a PACER  
16 login to download.

17           So honestly, Your Honor, I don't know what sanction  
18 you could give other than to rescind the benefit of the  
19 bargain and not allow the plaintiffs to use at trial the  
20 material they obtained pursuant to a promise to keep it  
21 confidential which has been breached.

22           THE COURT: Mr. Horton.

23           MR. HORTON: Your Honor, I'm going to let Mr.  
24 Yalowitz respond. I think there's a delay of a few seconds  
25 between when he talks and you hear him because of the phone

1 connection but as long as he's still on he'll respond. Ken.

2 MR. YALOWITZ: Thanks, Phil. Thank you, Your Honor.

3 I apologize for the technical problems I'm having.

4 I don't really want to dignify Mr. Hill's  
5 speculation with a lengthy rebuttal. This was an accident.  
6 It was inadvertent. This is nonsense that I'm trying to get  
7 it to the public in Israel. It's absolutely untrue. As a  
8 matter of fact, there's a seven hour time difference. So this  
9 event transpired in the middle of the night in Israel. So Mr.  
10 Hill -- this is just another example of the defendants being  
11 vexatious and harassing and trying to run up the costs for the  
12 plaintiffs in order to make litigation burdensome and avoid a  
13 trial. Thank you, Your Honor.

14 THE COURT: Well, I will say that from my point of  
15 view there's a lot of speculation on either side. I  
16 understand that there's a lack of trust on either side and  
17 certainly with respect to any time a matter has come to my  
18 attention the opponents have not gotten the benefit of a  
19 doubt.

20 I think ultimately as I said there's two overarching  
21 issues here. One, that preclusion is an extraordinary  
22 sanction; and two, given the concerns that the defendants  
23 have, is there some lesser sanction or approach that could  
24 address the possibility that the plaintiffs were negligent  
25 after a history of concern about disclosures. The other --

1 added to that is the question of well, if these issues -- if  
2 these documents are potentially going to be used at trial  
3 there is still the question that Judge Daniels would have to  
4 decide concerning the probative value of any of the  
5 information that's sought to be introduced.

6 I find that based upon the record before me that the  
7 defendants have not made out a case that preclusion is  
8 appropriate. While I -- in the normal course writing on a  
9 clean slate I might not have even had a conference under these  
10 circumstances but since it does appear that the plaintiffs  
11 have had more than one failure so to speak -- it's also true  
12 that there's a -- there are a lot of documents in this case  
13 and that the potential for missteps on either side do exist  
14 and -- while I'm not going to -- I'm not going to speculate  
15 about anyone's motives for bringing any motion on either side,  
16 I will tell the parties that I always impose a higher standard  
17 at the end of -- once discovery is complete to sort of go back  
18 and try to figure out how to rectify some failure.

19 But as to the question of preclusion, I think many  
20 of the things I've said with respect to the plaintiff's motion  
21 apply here in terms of when a court should apply preclusion  
22 and I don't think that's been made out in this case  
23 notwithstanding that the offense was on ECF for approximately  
24 an hour. So as to that -- as to the preclusion sanction, that  
25 is denied.



1           As to the plaintiff's motion to compel supplementary  
2 discovery material, and I gather the parties do not dispute  
3 the fact that discovery was produced in 2012 concerning the  
4 payment and the question is whether or not any payments that  
5 came after the close of discovery fit within the parameters of  
6 the rule requiring supplementation of discovery. Is that --  
7 is that what the -- is that where the --

8           MR. HORTON: Yes, Your Honor, that's correct and at  
9 this point I don't think there's any question either but that  
10 such documents do exist. The defendants are saying well, they  
11 would be merely cumulative of the documents we produced in  
12 2012 and we explained in our letters why we don't believe  
13 that's so. These could easily hold additional information.  
14 So the documents appear to be there. Everybody knows what  
15 they are and where they are and I think what we're really down  
16 to is a question of whether they have a duty to supplement or  
17 not and I think the weight of the case law is clear on that.

18           THE COURT: When you -- again, you use the term  
19 whether or not they contain new information. Now, new is one  
20 of those interesting words in English. It can be new in the  
21 sense that there is information which was not in the prior  
22 disclosures or it could mean information that's of a different  
23 character that that's in the prior information. And while I  
24 grant you that if you're talking about payments that have been  
25 made after the close of discovery they would be new in a sense

1 that it would be information that was not -- you could have  
2 information that was not in the prior disclosures. But as to  
3 the character of the information what -- because we're talking  
4 about -- supplementation is basically designed that a party is  
5 not prejudiced because there is new information -- there is  
6 information which is relevant which materially affects how  
7 they might approach the evidence in the case.

8           While the defendants characterize they're cumulative  
9 I prefer to characterize it as well, is it -- is -- is there  
10 any reason to believe that we're talking about something new  
11 in nature because we understand that the payments have been  
12 made. We know that the payments have been made to a number of  
13 different families. What would be the additional information  
14 materially for trial or for the jury that supplementation  
15 would provide?

16           MR. HORTON: There are two things, Your Honor. One  
17 is that the original payments are not -- the original records  
18 of payments produced in 2012 are not simply just ledger  
19 figures relating to X [inaudible] were paid on X date to this  
20 person but they contain certain commentary on the perpetrators  
21 and advocating for them saying what a wonderful thing it was  
22 they did, that's why we did it, and so since they -- since  
23 that sort of information tends to show up in these records it  
24 may very well be that there are additional new and culpatory  
25 statements going beyond simply the record of payments

1 contained in these documents. Obviously I can't know that  
2 because I can't see them right now but since we've seen it  
3 before it's reasonable to think that we will see it again. So  
4 it's clearly reasonably calculated to lead to the discovery of  
5 new information beyond simply the fact of the payments  
6 themselves.

7           The second is that the mere fact that payments  
8 continue essentially right up to date at trial is relevant to  
9 our claim for punitive damages. While punitive damages are  
10 automatic for our federal claims in which damages are trebled,  
11 we have non federal claims in which they are -- the old  
12 fashioned standard for punitive damages to apply of want,  
13 willful malicious misconduct and we would like to be able to  
14 argue to the jury that the fact that they have continued to  
15 make these payments not only throughout the litigation but are  
16 making them right up to the eve of trial and apparently now as  
17 we are in the trial is -- could be a highly relevant fact for  
18 the jury to consider in deciding whether the standard of  
19 willful, want and malicious conduct has occurred here.

20           THE COURT: Okay.

21           MR. HORTON: And it seems particularly appropriate  
22 since from what I hear they're not denying in their letters  
23 before you today that the payments have been made. They just  
24 don't want the jury to find out that they've been made.

25           THE COURT: Well, that's -- but that's a different

1 issue from whether or not the documents are going to provide  
2 any additional information of whether supplementation is  
3 necessary. In any case in which there is an allegation that  
4 something was taking place, and it's not restricted to this  
5 kind of a case, whether or not the practice continues is  
6 something that the parties can explore. You don't need to  
7 have additional documents.

8 I mean if your question -- if your issue is whether  
9 or not the defendants would be required to admit either before  
10 Judge Daniels or otherwise that the practice continues because  
11 it does seem to me that you can -- you can make an issue of  
12 that for trial purposes but --

13 MR. HORTON: The difficulty, Your Honor, is I have  
14 not the slightest doubt that when we get in front of Judge  
15 Daniels if the discovery is not made their position will be  
16 there is no documentary proof of on this, we refuse to agree  
17 to it and they can't prove it. So both sides will be sitting  
18 there knowing that the payments have been made as we all know  
19 on this call but I would be stunned if they are willing to  
20 stipulate to the jury that that is in fact the case. If  
21 they're willing to enter into such a stipulation now that  
22 might make it better. We would still have the problem of  
23 wanting to see if there are additional and culpatory  
24 statements.

25 THE COURT: I understand that, but Mr. Hill, are you

1 denying that the payments have been made or continue to be  
2 made? Because you argued that it was cumulative. That  
3 suggested to me that there was no dispute as to whether or not  
4 the payments continued.

5 MR. HILL: I'm not prepared to represent for each of  
6 the alleged perpetrators what their current payment status is,  
7 Your Honor.

8 THE COURT: Well, I understand that --

9 MR. HILL: But the [inaudible] of the policies  
10 haven't changed that I'm aware of.

11 THE COURT: Okay. So as a -- so the question is  
12 whether or not the -- I under -- you understand from the  
13 plaintiff's position they -- notwithstanding their position  
14 here as to the potential inculpatory information they want to  
15 be able to assert that the payments continue and I don't think  
16 this is a question of any particular individual payment  
17 continuing but that the fact this continues that individuals  
18 who are likely the persons who families have been made  
19 payments this practice continues. From an evidentiary point  
20 of view I think that does have some evidentiary value and the  
21 mere fact that we had a discovery cutoff does not make that  
22 information -- that factor relevant despite the fact that I  
23 might not impose upon a party the requirement that they  
24 produce documents.

25 The mere fact of continuance is a relevant inquiry

1 and I don't want this to be a trial issue. So I need to have  
2 some idea of what it is that you'd be representing as to the  
3 payments. Otherwise it may be that the -- just to demonstrate  
4 that the fact it continues the defendants may need to have  
5 documents. Most of the district judges don't mind having  
6 discovery continue up until the time of trial. I have not  
7 discussed this with Judge Daniels but my view is that unless -  
8 - at this point the case has not been made out that the  
9 individual documents are necessary but that the plaintiffs  
10 have a right to determine whether or not a practice that was  
11 in existence at the end of discovery continues.

12 MR. HILL: I don't think the plaintiffs need me to  
13 prove that. They've asserted in their letters that they have  
14 evidence of that including from one of the people they  
15 designated as an expert.

16 MR. HORTON: What will happen, Your Honor, is we'll  
17 get to the trial and he'll argue that our proof is  
18 insufficient and we'll be back in the same position we are  
19 right now which is the payments appear to be continuing and we  
20 won't be able to show it.

21 THE COURT: I agree with the plaintiff because I  
22 don't know what the proof is and I don't know whether the  
23 plaintiffs are -- what the plaintiffs are getting is informal  
24 or whether or not it would meet the standards of admissibility  
25 but my view is that to the extent that there was a practice

1 that was relevant even though discovery has ended the party  
2 who is trying to demonstrate that practice has a right to  
3 demonstrate and to know whether or not it continues. And I  
4 would not leave this to some unspecified and unknown  
5 information which may have come to the plaintiffs which made  
6 them suspicious that it does continue. I think to the extent  
7 that it was relevant that the practice existed it's relevant  
8 that it continues.

9 MR. HILL: Yes, but it's not relevant in the first  
10 place, Your Honor. We objected to the relevance of these  
11 requests contemporaneously with the request at the end of  
12 discovery. The plaintiffs never challenged that and these  
13 document requests don't request discovery after the end of  
14 discovery.

15 THE COURT: Well, let me answer that this way. If  
16 the information they have as of 2012 is not relevant and Judge  
17 Daniels agrees with that then you can exclude it from the  
18 trial. If, however, he believes that it is relevant, and he  
19 will make that determination -- remember, this is -- we're  
20 talking about discovery, not admissibility. If he believes  
21 that it's relevant then it's also relevant whether or not it  
22 continues. So we can't fix that at the time of trial.

23 So to the extent that it's a discovery issue what  
24 I'm saying to you is that plaintiffs have a right to know  
25 whether or not it continues. If you're right that it's not

1 relevant you can argue to Judge Daniels and it won't see the  
2 light of trial but as to a discovery issue to the extent that  
3 we have the information up until 2012 the parties will either  
4 find some way to agree that the practice continues or I'll  
5 leave it at the issue.

6 MR. HILL: Well, Your Honor, in all honesty we did  
7 not produce material up to 2012 for all the categories they're  
8 seeking. We produced it through the period of the attacks and  
9 to the extent it was produced post attack it was because it  
10 was on the same sheet of paper for the most part and we didn't  
11 cut the paper in half or white out what we viewed to be  
12 irrelevant post attack dates on the sorts of documents.

13 So we objected contemporaneously to post attacks  
14 material like this. The plaintiffs never sought a ruling from  
15 Your Honor to overrule those objections and now they're  
16 essentially asking to reopen discovery for conduct by the PA  
17 that took place during 2013 or 2014. Conduct by the PA in  
18 2013 or 2014 is not going to make the PA liable for injuries  
19 that occurred in 2001 to 2004 and if post attack conduct is  
20 relevant and would make our client liable the plaintiffs  
21 either have or had a chance to get that information during  
22 discovery. So to come now and say continuing payments are  
23 relevant is not correct. This claim that it goes to punitive  
24 damages is wrong. It doesn't show willful or wantedness and  
25 punitive damages are not available for these claims anyway.



1 The claim that it goes to ratification is also wrong because  
2 in order to be ratifying the perpetrator has to have claimed  
3 to have been an agent of PA and there's no evidence that any  
4 of these people made that claim.

5 So Your Honor is suggesting that we should now  
6 reopen discovery for the period after fact discovery is closed  
7 and we submit that's contrary to the language of the rule.  
8 It's contrary to the discovery requests which didn't even seek  
9 the information and it's unfair to the defendants because we  
10 objected and made production subject to that objection and the  
11 plaintiffs never sought to overrule that until now.

12 MR. HORTON: Well, Your Honor, Mr. Hill is now not  
13 only making the arguments you told him to make to Judge  
14 Daniels, what I'm hearing is his closing argument to the jury  
15 as to the weight of the evidence here. I've [inaudible].  
16 This is discovery. It seems clear that the documents exist.  
17 The fact that he's resisting producing them so mindedly speaks  
18 volumes about how relevant they actually are. They should be  
19 produced or at the very least he should stipulate that all the  
20 payments that were being made before to all of these  
21 perpetrators and their families are still being made.

22 MR. HILL: Well, that's discovery that was not sought  
23 during the discovery period and the fact that I'm resisting  
24 says nothing about what I view as its probative value. It's  
25 about the burden of reopening discovery two years after it's

1 closed.

2 THE COURT: Okay. Well, first of all, I don't know  
3 that we're talking about a burden here because it's really a  
4 representation as to whether or not the policy of making  
5 payments continues.

6 Secondly, as to the issue of whether or not the --  
7 or how this -- how they were produced and subject to objection  
8 I don't remember either side making an issue of that. All I'm  
9 saying is to the extent that they were produced either subject  
10 to objection or not subject to objections, whether or not the  
11 practice continues subject to objection is still -- it falls  
12 into the same category. That is I don't mind if you object to  
13 it but indicate that the practice continues. I mean it's  
14 still -- I don't see how that's different in kind from  
15 producing the information and objecting to it because  
16 ultimately as to whether or not it's relevant for trial that  
17 gets -- that gets sorted out at trial.

18 As to whether or not it's a discovery issue, that  
19 seems to me that to the extent that information was produced  
20 about a practice whether or not you objected to it, whether or  
21 not there had been -- the simple question of whether or not  
22 the practice continues is not -- is not an opening of  
23 discovery. It is just a -- it's just -- it's just indicating  
24 that the status at the time of the production has not changed.  
25 I mean sometimes that's relevant and sometimes it's not.

1 But as to the arguments that either side are making  
2 concerning what should happen for the jury, I don't know if  
3 any of this will ever see the jury. That's not what discovery  
4 is about.

5 So I repeat, to the extent that the information was  
6 produced I find that the continuation of the practice, and  
7 that does not mean that it's a detailed description of every  
8 payment that was made but only a statement as to the  
9 continuation of the policy of the information that's already  
10 been produced whether or not it was part of a page or not part  
11 of a page, I know that payments had come up in the prior  
12 discovery discussions we've had. So I'm not exactly sure what  
13 parsing the defendants did in terms of reserving the expense  
14 of the disclosures.

15 But, Mr. Hill --

16 MR. HILL: Yes, Your Honor.

17 THE COURT: -- I don't think this is the -- this  
18 falls into the category of supplementation and that I agree  
19 with you on. But I do believe, as I said, to the extent that  
20 information was produced about a practice, I mean if -- if,  
21 for example, the police had a practice of stopping and  
22 frisking people and it was true as of a certain date I think  
23 at trial it would be relevant whether or not the practice  
24 continued. You could argue whether or not the information was  
25 relevant to begin with but to the extent that it was relevant

1 what the practice were it's relevant from a discovery point of  
2 view whether or not the practice continues. I think you're  
3 perfectly free to argue before Judge Daniels that even the  
4 information that you've produced already should not be  
5 admitted at trial but to the extent that that information he  
6 finds relevant I'm sure he'll find that the continuation of  
7 the practice is also relevant.

8 MR. HILL: Your Honor, I guess my only point is that  
9 if the plaintiffs want to take discovery on this particular  
10 practice and whether it would continue post trial, the time to  
11 propound that discovery was during the fact discovery period  
12 and had they not done so Your Honor is in essence allowing  
13 them to reopen discovery on this albeit narrow issue of the  
14 continuation of past policy or practice.

15 And Your Honor's example about stopping and  
16 frisking, I don't know what case Your Honor has in mind, but I  
17 presume it's not a tort case where the injury occurred a  
18 decade ago. So we're talking about material which couldn't  
19 possibly make the defendants liable but if post attack  
20 materials could make the defendants liable the plaintiffs  
21 already could have got that during discovery and that's the  
22 basis for my objection. I agree with you that no  
23 supplementation is required and what Your Honor appears to be  
24 complimenting here -- or contemplating here is a relief that  
25 plaintiffs haven't even asked for which is reopening discovery

1 on this question of policy and I've already informed the court  
2 and I presume the call is being recorded and there will be a  
3 transcript about my understanding of the lack of any change in  
4 the policy. So I'm not sure what more the plaintiffs can  
5 expect under Your Honor's view of the circumstances here.

6 MR. HORTON: Well, Your Honor, we've heard -- I think  
7 I've heard Mr. Hill to say that he personally does not  
8 understand that there is any change in the policy but he  
9 doesn't know if that is true as with respect -- as an actual  
10 fact with respect to whether payments are still being made to  
11 the perpetrators and the family of the perpetrators in this  
12 case, and I don't want to get in front of Judge Daniels and  
13 have him say oh, yes, the policy hasn't changed but we  
14 actually stopped making payments to the actual perpetrators in  
15 this case. I want to know now whether that's -- whether  
16 they're actually making those payments or not. If Mr. Hill  
17 doesn't know that today I can understand that but he needs to  
18 find out and add that to his representations that in fact the  
19 payments are still being made.

20 MR. HILL: Your Honor, if Mr. Horton's predecessor  
21 had wanted to propound that discovery during fact discovery  
22 that would have been the time to do it. We're essentially now  
23 contemplating new discovery after the close of discovery about  
24 this policy. There's no discovery that I'm aware of on this  
25 particular issue of these policies or their continuing nature.

1 THE COURT: Well, how would someone frame discovery  
2 about a continuing practice?

3 MR. HORTON: That's what I was about to say, Your  
4 Honor. I don't understand -- I can only imagine Mr. Hill's  
5 response if we had sent in discovery request before 2013 which  
6 says please detail the payments made during 2013 and 2014,  
7 periods which haven't arrived yet on the calendar.

8 MR. HILL: Well, the way they would have done it  
9 would be propound discovery that said through the date of  
10 trial continue to tell us what these things are, and there was  
11 no discovery [inaudible] policies at all.

12 MR. YALOWITZ: Can I [inaudible], Your Honor?

13 MR. HILL: I mean that's the problem [inaudible]  
14 reopening discovery.

15 MR. YALOWITZ: I think Mr. Hill is misrepresenting  
16 the record here. We asked for the entire, the complete  
17 personnel files on these perpetrators and now the personnel  
18 file includes [inaudible] paying them through the date of  
19 trial. We asked for this information. For him to sit there  
20 on the phone and [inaudible] about we asked for it, it's  
21 really a misrepresentation and I'm sorry for the interruption  
22 but I think that it's very important when Mr. Hill makes a  
23 representation about the facts of record that he checks  
24 because he often makes misrepresentations.

25 MR. HORTON: Your Honor, actually something similar.

1 If you will look at the letter we sent you yesterday we  
2 actually quote back the language from our request which makes  
3 clear that we sought all of these documents.

4 MR. HILL: [Inaudible] objection, Your Honor.

5 THE COURT: Counsel, counsel --

6 MR. HILL: It's unlimited in time and that objection  
7 was never sought to be overruled.

8 THE COURT: Counsel, let -- again, because I have the  
9 benefit of having the last word I think I made myself clear.  
10 It seems to me that consistent with the federal rules I have  
11 the ability and the authority to say that notwithstanding what  
12 the parties present resolving a dispute consistent with Rule 1  
13 could involve the least intrusive and expensive and use of  
14 time in terms -- to establish what it is that the parties have  
15 raised as an issue.

16 It seems to me that what the plaintiffs have  
17 essentially raised as an issue is -- putting aside for the  
18 moment that they assert that maybe there might be some new  
19 information but what they've essentially asserted is that they  
20 believe that the practice even after the incidents that have  
21 been -- that have been set forth as evidence of all the  
22 violence and the terror that they allege payments after that  
23 are relevant. They have alleged that. They've asked for it.  
24 They've gotten some information on it.

25 To the extent that they have gotten that information

1 and to the extent that Judge Daniels decides that it's  
2 relevant then the continuation of the practice also has some  
3 relevance. He may -- the judge may decide that payments after  
4 any bombing is irrelevant in which case all this will fall  
5 out. He may decide that both payments up to the time of  
6 discovery and up to the time of trial are relevant and non  
7 cumulative. He may decide that -- to cut it off at a  
8 particular point. I don't know.

9 But to the extent -- my holding is to the extent  
10 that the information has been provided concerning payments  
11 after the fact, however you want to characterize the people  
12 who are getting the payment, however you want to characterize  
13 the family members that -- to the extent that that's been  
14 done, whether or not the practice continues is something that  
15 I think you should be prepared not only to respond to now as  
16 it continues but I think Judge Daniels would be interested as  
17 to whether this matter continues even as of the date of trial.

18 So as far as the plaintiff's request for a motion to  
19 compel I don't see a basis for compelling a detailed  
20 documentation because I don't think this falls into the  
21 category of new as contemplated by the rule but I do think  
22 that the issue raised by the plaintiffs as to the continuation  
23 of the payments is relevant and arguably falls within the  
24 parameters of supplementation.

25 So I understand the representations that Mr. Hill



1 has made but I think something more than just Mr. Hill's  
2 belief would be sufficient to satisfy the court.

3           So that's where I'm leaving it. Mr. Hill, I think  
4 it's always -- as always the parties are encouraged to see if  
5 they can work out something that does not involve the court  
6 but if you disagree as to what's a relevant -- what's an  
7 appropriate solution to the question of continuation you can  
8 each submit to me what your view of what would be an  
9 appropriate stipulation and I will decide which one is  
10 sufficient and adequate to address the question of the  
11 continuation of the policy of payments.

12           If you're not able to resolve that among yourselves  
13 after hearing what I've said you may bring it up to me but I  
14 expect that I will hear -- I will get your different views on  
15 this no later than Friday.

16           MR. YALOWITZ: Your Honor --

17           THE COURT: Yes. Mr. Yalowitz?

18           MR. YALOWITZ: Yes. I don't think -- thank you, I'm  
19 sorry.

20           THE COURT: All I had was "Your Honor." I thought  
21 you were about to say something.

22           MR. YALOWITZ: No, no. Just I got the ruling that we  
23 asked for so we're appreciative of the court's assistance.

24           THE COURT: Okay. Again, as I said, this is just --  
25 to me this is a simple question of whether or not a policy

1 continues which had to do with payments that were made with  
2 documents that were produced concerning payments that were  
3 made after the incident that are at issue. You're certainly  
4 at some point you're free to argue this before Judge Daniels  
5 but what Judge Daniels doesn't want is for this to be a  
6 discovery dispute and that is so I'm resolving the discovery  
7 dispute by ruling that the continuation is relevant and should  
8 be indicated.

9           Knowing the history you might disagree on what would  
10 be an appropriate formulation but if you disagree you can each  
11 submit a proposed -- if you can't agree on a stipulation you  
12 can do a proposed order to me and I will take it upon myself  
13 to direct the parties -- direct the defendants to do what I  
14 believe is necessary to comply with the rules.

15           MR. HORTON: Your Honor, this is Phil Horton. With  
16 some trepidation I raise just one wrinkle which is while most  
17 of what we're looking for are payments the other issue is  
18 whether the perpetrators had received further promotions  
19 during 2013 and 2014 because prior to that time perpetrators  
20 who are serving lengthy sentences for these acts have received  
21 promotions from say captain to major while they've been  
22 imprisoned for these acts. So we want to know whether that is  
23 continuing as well.

24           MR. HILL: Your Honor, I just call your attention to  
25 the specific document request which says all documents

1 concerning the rank or ranks held by Salai between January 1,  
2 2000 and today, and today as of the date of that document was  
3 November 21, 2012. Rank was specifically limited in the  
4 document request to the date of the request.

5 MR. YALOWITZ: Your Honor, personnel files includes  
6 his promotions. So that's why you issued multiple requests to  
7 cover the same ground from different angles so that the party  
8 producing the information [inaudible] play games like this.

9 MR. HILL: It's not playing a game. It's objecting  
10 and it's the language of the request that plaintiffs chose.

11 THE COURT: Well --

12 MR. HORTON: Your Honor, we will submit a proposal to  
13 the defendants and if we can't agree on it then we will submit  
14 it to you.

15 THE COURT: Okay. That's the approach to take  
16 because we could go round and round on this but ultimately  
17 there's going to be the distinction -- I will make the  
18 distinction between what is supplementation, what is  
19 cumulative and what is a fair statement of what happened to  
20 the policy from the time of discovery to the time of trial.

21 So hopefully -- I always -- I'm always optimistic  
22 that the parties will do their best efforts to agree because  
23 you can't be sure whether or not your position will be  
24 approved by the court. So if you have a compromise it always  
25 seems to me to be the better course for parties at least do

1 what you can live with and move on.

2 We'll be adjourned. If I hear -- if you submit  
3 anything on Friday or if you have any questions call my law  
4 clerk.

5 MR. HORTON: Thank you very much, Your Honor.

6 MR. HILL: Thank you, Your Honor.

7 THE COURT: We're adjourned.

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

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7 Shari Riemer, CET-805

8 Dated: October 22, 2014  
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